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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-585

THIOKOL CHEMICAL CORPORATION,
Petitioner,

—vs.—

BURLINGTON INDUSTRIES, INC.

and

AVISUN CORPORATION,
Respondents.

REPLY BRIEF FOR PETITIONER

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Both respondents have opposed the petition on the asserted basis that there was no threat of an action for patent infringement against Thiokol's customers.

That argument ignores the following uncontroverted facts:

1. The license agreement required the licensee Thiokol to pay royalties only on its sales of backing materials "which, but for this license, would infringe" the licensed patents when made into tufted fabrics.

2. The licensor Burlington had demanded the payment of royalties on Thiokol's sales of the backing materials in question (thereby asserting that tufted fabrics incorporating these backing materials would "infringe" the patents in the absence of a license).

3. The license agreement further provided that Thiokol's customers were licensed only if Thiokol had paid the specified royalty.

4. Thiokol had not paid such royalty on the materials in question (so that its customers were not licensed to use these materials).

Consequently, Thiokol's customers were clearly subject to an action for patent infringement, even before the license agreement was formally terminated. And, although Burlington had not expressly threatened to bring such an action against Thiokol's customers, it had undeniably charged them with patent infringement. Such a charge, even when made only by implication, has been universally recognized as creating the "justiciable controversy" necessary to confer jurisdiction of an action for declaratory judgment. See, e.g., *Muller* v. *Olin Mathieson Chemical Corp.*, 404 F.2d 501, 504-5 (2 Cir. 1968), and cases discussed therein.

Respectfully submitted,
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